COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2013-SC-000489-D

ON APPEAL FROM
KENTUCKY COURT OF APPEALS
CASE NO. 2012-CA-000660

FILED
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CLERK
SUPREME COURT

BONITA BEAUMONT — APPELLANT

v.

MULUKEN ZERU — APPELLEE

BRIEF FOR APPELLEE

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with CR 76.12(5) and (6), the undersigned certifies that a true and correct copy of this Brief for Appellee, Muluken Zeru, has been served upon the following by U.S. mail, postage prepaid, on this 5th day of August, 2014: Hon. Barry L. Willett, Judge, Jefferson Circuit Court, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, Kentucky 40202; Edward C. Airhart, Airhart & Associates, 440 South Seventh Street, Suite 200, Louisville, KY 40203, counsel for Appellant; and Sam Givens, Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; and that 10 copies were sent via UPS – next day delivery to Hon. Susan Stokley Clary, Clerk, Supreme Court of Kentucky, Room 209, New Capitol Building, 700 Capitol Avenue, Frankfort, Kentucky 40601.

W. Douglas Kemper

INTRODUCTION

In this case, Appellant urges this Court to establish a new rule for determining the measuring date for the Motor Vehicle Reparations Act's (MVRA's) Statute of Limitations, KRS 304.39-230. The rule Appellant proposes, which is contrary to existing authority, is unworkable because it would establish a moving target that would impose an unnecessary, and perhaps impossible, burden on litigants and trial courts in determining the proper deadline for actions brought under the MVRA, and thus should be rejected.

STATEMENT CONCERNING ORAL ARGUMENT

Pursuant to CR 76.12(4)(d)(i), Appellee does not believe oral argument is necessary in this matter. The resolution of this matter involves a straightforward adoption and application of the Court of Appeals' holding in *Wilder v. Noonchester*, 113 S.W.3d 189 (Ky. App. 2003) and other unpublished Court of Appeals opinions.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE[1]

On April 24, 2008, Appellant was involved in a motor vehicle accident with Appellee. (R. at 250). Appellant claimed that she sustained bodily injuries in that collision and, accordingly, sought treatment for her injuries. (R. at 251). Appellant's automobile insurance company, Cincinnati Insurance Company, made payments for her medical expenses. Appellant received and, in fact, exhausted her available PIP benefits[2] by directing her own insurance company to directly pay her providers for the medical expenses related to the treatment of her alleged injuries. *Id.* Appellant's PIP file with Cincinnati Insurance[3] established that on August 13, 2009, the insurer (Appellant's own reparations obligor) sent a letter to Jewish Hospital indicating that the insurer was paying only $979.00 of Appellant's medical bill, which totaled over $4000.00, because "the $979.00 payment represented the remaining balance of Ms. Beaumont's PIP coverage." (R. at 257). That letter also stated that it served "as [Cincinnati Insurance's] PIP exhaustion letter." *Id.*

Cincinnati Insurance's file also showed that on September 15, 2009, Cincinnati Insurance sent letters to Liberty Mutual[4] and at least three of Appellant's medical providers (other than Jewish Hospital) notifying them that Appellant's PIP coverage had been

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[1] Pursuant to rule 76.12 (4)(d)(iii), Appellee hereby states that he does not accept the Appellant's Statement of the Case.

[2] The pivotal issue here relates to payment of Basic Reparation Benefits, which are also called "Personal Injury Protection" benefits or "no-fault" benefits. These terms are used interchangeably. *Coleman v. Bee Line Courier Service, Inc.*, 284 S.W.3d 123, 123, n. 1 (Ky. 2009). For ease of reference, the terms "PIP benefits" or "PIP payment" will be used herein.

[3] Appellant's PIP file with Cincinnati Insurance was obtained pursuant to subpoena in the course of discovery and relevant documents were made part of the trial court Record.

[4] Liberty Mutual was Appellee's liability carrier and the letter was sent to advise Liberty Mutual of Cincinnati Insurance's subrogation claim pursuant to KRS 304.39-070(3), which provides that a reparations obligor in Cincinnati Insurance's position (i.e., the insurer for the alleged not-at-fault driver) has a right to be reimbursed by the reparations obligor for the at-fault party.

exhausted. (R. at 260-264). Also on September 15, 2009, an email was sent to Kevin O'Donnell, the Cincinnati Insurance adjuster assigned to handle Appellant's PIP claim, requesting a "Stop Payment" on a check dated March 17, 2009 that had been issued to Springhurst Physical Therapy ("Springhurst"). (R. at 259). The "Stop Payment" was requested because Springhurst reportedly lost the check that Cincinnati Insurance sent on March 17, 2009. *Id.* Thereafter, on September 25, 2009, in response to the request from Springhurst Physical Therapy, the March 17 payment to Springhurst was designated as "reversed" in Cincinnati Insurance's PIP payment ledger and Cincinnati Insurance issued a new check to Kentucky Orthopedic Rehabilitation, LLC ("Kentucky Orthopedic") to replace the lost March 17 check. (R. at 265). This was not for payment of any new or different service, but simply sent as an accommodation to the provider to replace the check it had lost.

It is undisputed that Springhurst Physical Therapy and Kentucky Orthopedic Rehabilitation, LLC are simply different names for the same legal entity that provided medical care for Appellant and in return was paid by her insurer, Cincinnati Insurance, pursuant to her PIP claim. Public records from Kentucky's Secretary of State establish that Springhurst is the legally assumed name of Kentucky Orthopedic. (R. 298-303). Springhurst and Kentucky Orthopedic are therefore simply different names for the same medical provider. Thus, the original payment dated March 17, 2009 and the replacement check were both issued to the same medical provider for the same service, which had been provided sometime prior to March 17, 2009.

On September 21, 2011, over two years after Appellant's PIP benefits had been exhausted, Appellant filed the subject lawsuit against Appellee for injuries allegedly

related to the August 24, 2008 accident. (R. at 1-2). Appellant alleged that the last PIP payment was made on September 25, 2009. (R. at 1). However, September 25 was not the date of the last PIP payment, but rather the date on which Cincinnati Insurance issued a replacement check to a provider to take the place of a payment the insurer had already made on March 17, 2009. (R. at 265). The final PIP payment had already been made on **August 13, 2009** when Cincinnati Insurance made a partial payment to Jewish Hospital and thereby **exhausted** Appellant's PIP benefits. (R. at 257). Thus, Appellant's Complaint was filed outside of the two year statute of limitations found in KRS § 304.39-230(6) and is therefore time-barred.

In the trial court, Appellee asserted a statute of limitations defense in his Answer and subsequently moved for summary judgment on the same grounds. (R. at 10, 248-269). On April 2, 2012, the Honorable Judge Barry Willett of the Jefferson Circuit Court granted Summary Judgment in Appellee's favor, dismissing with prejudice all of Appellant's claims against Appellee. (R. at 268). On June 28, 2013, in a 2-1 decision, the Kentucky Court of Appeals affirmed that ruling in reliance on its own prior precedent. In dissent, although Judge Combs agreed with the logic and relevance of the Opinion on which the majority relied, she concluded that Appellee was estopped from relying on what might otherwise be a valid statute of limitations defense due to representations Cincinnati Insurance (**Appellant's – not Appellee's – insurer**) had made to Appellant's counsel regarding the date of its last PIP payment.[5]

[5] As will be discussed *infra*, Cincinnati Insurance was not Appellee's reparations obligor and thus there is no basis on which to attribute to Appellee Cincinnati Insurance's incorrect representation of the date of the last PIP payment, thereby estopping him from asserting an otherwise valid statute of limitations defense.

ARGUMENT

I. The Date the PIP Provider *Issued* the Check is the Proper Measuring Date Pursuant to KRS § 304.39-230(6).

It is undisputed that the applicable limitations period that controls the outcome in this matter derives from KRS § 304.39-230(6) which states that "[a]n action for tort liability not abolished by KRS 304.39-060 may be commenced not later than two (2) years after the injury, or the death, or the last basic or added reparation payment made by any reparation obligor, whichever later occurs." KRS § 304.39-230(6). The language used in the statute is clear and unambiguous, and provides a clearly defined bright-line rule that is relevant to the issue before the Court.

In the present action, **August 13, 2009** is the correct measuring date for purposes of establishing the running of the statute of limitations. On that date Cincinnati Insurance made a partial payment to one of Appellant's medical providers for services rendered to Appellant. The reason it was only a partial payment is that the payment made brought the total of all payments to $10,000.00, the amount available for Appellant's PIP claim. In making the payment, Cincinnati Insurance advised the provider that the partial payment exhausted Appellant's available PIP coverage. It is axiomatic that if there were any remaining benefits they would have been paid to Jewish Hospital at that time. Moreover, in the following weeks Cincinnati Insurance advised three other providers as well as Appellee's insurer that Appellant's PIP coverage was exhausted. The August 13, 2009 partial payment to Jewish Hospital represents the last payment that was made pursuant to Appellant's PIP claim, thereby exhausting Appellant's PIP benefits. As such, it cannot seriously be disputed that **August 13, 2009** is the proper measuring date for determining "the last basic or added reparation payment made by any reparation obligor." KRS 304.39-

230(6). Appellant's PIP benefits were exhausted. Appellant's own insurer said so to a provider whose bill was not being fully paid as a result of the benefits being exhausted, as well as to three other providers who submitted bills for payment under Appellant's PIP coverage.

Despite the fact that the last payment that exhausted Appellant's PIP coverage was made on August 13, 2009, Appellant argues that her claim is not time-barred because the statute of limitations began to run from one of two dates: (1) the date that the medical provider received the September 25 replacement check, or (2) the date that Cincinnati Insurance Company's bank accepted the check and transferred funds from the insurance company's account to the medical provider's account. This raises two issues that will be addressed in turn. First, what is the proper measuring date in general? Is it: (1) the date recorded on the payment check itself and/or the PIP payment log as the date the check was disbursed by the reparations obligor (in this case Cincinnati Insurance); (2) the date on which the payee receives the check; or (3) the date on which the check is actually presented for payment to the bank on which it is drawn? The next question then is what, if any, effect does a replacement check have when it is issued subsequent to a claimant's PIP coverage being exhausted and which is meant only to replace a check that a provider or other payee has reported as lost but which originally was issued prior to the PIP coverage being exhausted?

First, it is important to establish the appropriate general approach, and then determine if the added fact of having a replacement check calls for deviation from the general approach. In support of her argument that Appellee's approach is incorrect and should be abandoned, Appellant ignores applicable Kentucky precedent and instead

improperly urges this Court to apply commercial paper and bankruptcy law principles to the instant case. However, there is no support for Appellant's position in support of which she relies on bankruptcy law and Article 3 of the UCC, both of which are wholly inapplicable here. This case does not involve commercial paper or UCC issues. The dispute here does not center around whether an instrument was dishonored or whether a debt was discharged. There is no dispute about whether a financial transaction should be nullified because it was made in derogation of the Bankruptcy Code. The sole question presented is: When is a PIP obligor deemed to have made a payment under the MVRA?

In analyzing the approach Appellant espouses, it is important to keep in mind that the actual transfer of cash money between the insurance company's bank and any particular provider is not the gravamen of the transaction that is important in determining the measuring date for the statute of limitations. Rather, the important relationship that is the key to determining the proper measuring date is between the insurance company (here, Cincinnati Insurance) and its insured (here, Appellant). The way things work under the MVRA for payment of PIP benefits is that the insured directs the insurance company to make payment for qualifying expenses and the insurance company makes payments as directed by disbursing checks in accordance with its insured's direction. As such, payment law principles simply do not provide a useful or relevant framework around which to build an approach for determining the appropriate measuring date for the MVRA's statute of limitations.

Indeed, Appellant does not, and is unable to, cite to any authority whatsoever for extending payment law principles to the MVRA and the facts of this case because Appellant's position runs afoul of clear precedent from the Court of Appeals. Despite

Appellant's artful contentions to the contrary, Kentucky law provides a bright line rule that the "date the PIP provider *issued the check* is the date the PIP provider 'made' the payment. *Wilder v. Noonchester*, 113 S.W.3d 189, 191 (Ky. App. 2003) (emphasis added); *Wehner v. Gore*, No. 2005-CA-000689-MR, 2006 WL 2033894 (Ky. App. 2006) (copy attached as Exhibit 1). That bright-line rule is fully applicable here and Appellant has presented no sound arguments which would merit a deviation from that rule. In fact, the approach she advocates – aside from being inapplicable – would insert undue and unnecessary complexity into the determination of the date of the last PIP payment, as discussed *infra*.

In *Wilder,* a motorist struck a horse on a public highway and brought an action for personal injuries against the horse's owner. Kentucky Farm Bureau Insurance Company made the final PIP payment on behalf of the motorist to medical service providers on October 25, 1999. *Id.* at 190. The motorist, Wilder, sought to amend her complaint to include the Noonchesters, the owners of the land where the horse was maintained. *Id.* On October 29, 2001, the trial court granted Wilder's motion to add the Noonchesters as defendants. *Id.* Thereafter, the Noonchesters moved to dismiss the action claiming Wilder's claim was made outside the two year statute of limitations as provided in KRS § 304.39-230. *Id.* The trial court granted the Noonchesters' Motion to Dismiss and Wilder appealed, claiming the statute of limitations does not run until the medical provider *deposits* the last PIP payment into its bank account. *Id.*

On appeal, a panel of the Court of Appeals held that "the date the PIP provider made the last payment to the medical service provider begins the running of the two-year statute of limitations." *Id.* The Court further concluded that the date the PIP provider *issues the check* is the date the payment was made. *Id.* at 191. Since Wilder's last PIP

payment was made on October 25, 1999, and the request seeking to add the Noonchesters was made more than two years later, the Court of Appeals affirmed the trial court's ruling denying the addition of parties because the request was made outside the statute of limitations period. *Id.* As such, the rule in Kentucky for over a decade has been that the MVRA statute of limitations begins to run when the last PIP payment is *issued* by the claimant's reparations obligor. *Id.* Contrary to Appellant's recommended approach, that is a date that easily can be ascertained through documents readily available to the parties before the Court. Specifically, that date can easily be determined with certainty by viewing the PIP payment log maintained by the claimant's insurer. This approach has been consistently followed without exception by subsequent panels of the Court of Appeals. Although this Court has never specifically adopted or ratified the holding of the *Wilder* Court, this case provides a clear opportunity for it to do so.

Moreover, in an unpublished Opinion, a different panel of the Court of Appeals unequivocally rejected the approach put forth by Appellant that seeks to incorporate UCC principles in determining the limitations measuring date for the MVRA. *See Aleshire v. Berenbroick*, Action No. 2005-CA-001470-MR, 2006 WL 1714810 (Ky. App. 2006) (copy attached as Exhibit 2). In *Aleshire,* the claimant's last PIP payment check was generated by the insurer on September 6, 2002. It was received by Aleshire on or after September 9, 2002 and cashed on September 16, 2002. Aleshire's personal injury complaint was filed on September 16, 2004. The insurer argued that the date of the last PIP payment was September 6, 2002, and therefore Aleshire's Complaint was time-barred. Citing to banking law principles, Aleshire claimed that the statute of limitations period ran from the date the check was actually cashed rather than the date it was issued. *Id.* at *1. The Court of

Appeals rejected Aleshire's argument and properly followed the *Wilder* Court's reasoning and holding that the date the insurer *issued* the check is the date on which the insurer made the PIP payment. *Id.*

Principles of statutory construction also mandate that the MVRA and its progeny control in this case – not payment law principles. The primary rule of statutory construction is to ascertain and give effect to the intent of the Legislature. *Kentucky Ins. Guar. Ass'n v. Jeffers*, 13 S.W.3d 606, 610 (Ky. 2000). Where one statute deals with a subject matter in a general way and another in a specific way, the more specific provision prevails. *Travelers Indem. Co. v. Reker*, 100 S.W.3d 756, 763 (Ky., 2003); *DeStock #14, Inc. v. Logsdon*, 993 S.W.2d 952, 959 (Ky., 1999). KRS 304.39-230(6) is a "*special* statute of limitations, part of a comprehensive, integrated code (the MVRA) applicable to the rights and liabilities of motor vehicle accident victims." *Troxell v. Tramell*, 730 S.W.2d 525, 528 (Ky., 1987) (emphasis in original). Pursuant to statutory construction principles, a special statute preempts a general statute. *Id.*

This Court has acknowledged that the MVRA is a "self-contained Act." *Progressive Northern Ins. Co. v. Corder,* 15 S.W.3d 381, 384 (Ky. 2000). For over a decade, the approach set forth under existing authority, which was followed by the trial court and the Court of Appeals below, has provided a logical, workable approach that provides ease in administration by establishing a readily ascertainable bright-line rule to guide practitioners and courts around the state in determining the measuring date for the statute of limitations under the MVRA. Therefore, there is no need to look outside of the MVRA to interpret and apply the statutes contained therein. Accordingly, Appellant's argument in favor of expanding general payment law principles to the MVRA's statute of

limitations, which was drafted specifically in regard to motor vehicle reparation issues, must fail. In other words, there is no dire need for this Court to disturb or modify what has proven to be an effective and logical approach. Incorporating UCC and payment law principles would serve no useful purpose, but rather would introduce uncertainty into Kentucky law. Indeed, Appellant does not, and cannot, cite any authority extending payment law principles to the MVRA, but simply searches for a way to lengthen the MVRA's limitations period. A thorough review of the law of all fifty states reveals that **no state has ever utilized such an approach**. Thus, if this Court were to implement such a procedure for incorporating UCC principles into the MVRA, Kentucky would stand alone in doing so. As pointed out in *Aleshire, supra*, an "easily documented final date is appropriate." *Aleshire*, at *1. Appellant's approach would have just the opposite effect.

Appellant erroneously argues on page 16 of her Brief that the approach Appellee espouses – which has been the law of the Commonwealth for over a decade – indicates Appellee has not "truly looked within the MVRA" or considered the effect that this approach would have in applying the subrogation scheme between reparation obligors set forth in KRS 304.39-070(2). Appellant states that a check must be honored "no matter what date controls for the purpose of limitations (issuance, delivery or honor)," and concludes that "[i]f the rule were otherwise, the no-fault carrier would have greater rights in subrogation than the automobile crash victim would have to bring the claim in the first place." Appellant's argument is misdirected and falls flat, primarily because it is based on a faulty premise that the "no-fault carrier's subrogation rights are wholly derivative of the injury victim's rights." *Id.* That is an incorrect statement of Kentucky law. While it is true that reparations obligors have certain common law subrogation rights against an

unsecured (i.e., uninsured) tortfeasor (to which Appellant refers here), they also have statutorily-created subrogation rights against other reparation obligors under certain circumstances. KRS 304.39-070(3). Moreover, there are separate rules that govern the dealings between reparations obligors and the timing for presenting those claims.[6] Thus, this argument does nothing to advance Appellant's position.

In further support of her position, Appellant appears to argue that the timing of the PIP payment should be deemed to be the last possible time to accommodate the tort rights of the accident victim. Appellant's position is presumptuous and unsupported by any valid authority. Notwithstanding Appellant's lack of valid authority, even a liberal interpretation in favor of the accident victim does not negate the compelling logic supporting the holding of the *Wilder* Court and its progeny. Kentucky law clearly holds that a PIP payment is made when it is disbursed to the provider. *Wilder*, 113 S.W.3d at 191. The disbursement date, which is the date on which the PIP obligor makes the payment, can be easily determined by reference to the PIP obligor's payment ledger. *Lawson v. Helton Sanitation, Inc.*, 34 S.W.3d 52, 56 (Ky. 2001).[7] Here, Appellant's PIP payment ledger and corresponding file told a compelling story and the *Wilder* holding mandated the result reached by the trial court and affirmed by the Court of Appeals. There is no reason to deviate from that holding by disturbing that result.

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[6] KRS 304.39-070(3) governs the manner in which a reparation obligor can seek recovery for its payments and requires the insurer to either intervene in its insured's lawsuit or seek reimbursement directly through the Kentucky Arbitration Association, which has its own set of procedural rules, including a statute of limitations.

[7] Appellant's claim that the *Lawson* Court's reliance on the PIP obligor's payment ledger is dicta and not binding on this Court is a red herring. While that specific issue was not before the *Lawson* Court, it is clear that the Court relied extensively and exclusively on the PIP payment ledger to establish the dates on which the PIP obligor made payments to various providers under the PIP coverage, and also relied on a related ledger showing payments under the Med-Pay provisions of the same policy.

Appellant also erroneously argues that Appellee's reliance on *Wilder* was misplaced because *Wilder* dealt with wire transfers and not payment of checks. Appellant also questions the general correctness of the *Wilder* decision. Both arguments are without merit, as the point of law for which the case is cited is fully applicable to the present action. Further, other panels of the Court of Appeals have subsequently followed *Wilder's* holding, confirming its correctness. For example, another panel found that *Wilder* "makes it clear that that the date a check is received or deposited has nothing to do with the *date* of final payment. Final payment is the date the last check is cut, dated, or 'made'." *Wehner*, at *1. This Court therefore should disregard Appellant's objections because *Wilder* is a well-reasoned decision that continues to have full precedential value in Kentucky, and mandates the result obtained in the trial court. There is no sound reason to depart from its holding.

Appellant's approach seeking to incorporate and allegedly harmonize the MVRA with other unrelated areas of law is, simply put, wrong and does not find support under Kentucky law. The MVRA is a self-contained Act that controls in the instant case. Therefore, UCC and payment law principles are entirely irrelevant and have no application here. Rather, this Court should affirm and adopt the well-established rule articulated by the Court of Appeals in *Wilder* and followed in *Wehner*, which is dispositive of the issue before this Court: a PIP payment is made when the check is issued by the PIP obligor. *Wilder*, 113 S.W.3d at 191; *Wehner,* at *1.

II. A Replacement Check Issued After PIP Coverage Has Been Exhausted Does Not Re-Start the Measuring Date for the Applicable Statute of Limitations.

As a second part of the analysis of this matter, the Court must determine the impact, if any, of a replacement check issued after a claimant's PIP benefits have been exhausted. Here, as established above, Cincinnati Insurance made its last payment exhausting

Appellant's PIP coverage on August 13, 2009. However, subsequent to that date, and at the request of one of Appellant's medical providers, Cincinnati Insurance replaced a check that was initially issued on March 17, 2009, but was subsequently reported by the provider as being lost. (R. at 265). The replacement of the earlier-disbursed check does not affect the running of the statute of limitations and therefore Plaintiff's Complaint is time-barred.

Appellant incorrectly argues that the date the September 25 replacement check was issued is the date from which the statute of limitations should be measured. Once again, Appellant's argument seeks to disregard applicable Kentucky authority which expressly provides that the issuance of a replacement check to a medical provider does not affect the running of statute of limitations under KRS § 304.39-230(6). *Wehner,* 2006 WL 2033894. Appellant argues that the Court of Appeals decision in *Wehner v. Gore,* which happens to be directly on point and factually almost identical to the present action, should not be applied here because it is unpublished and because it conflicts with the logic of the *Wilder* Court's decision. However, *Wilder* and *Wehner* do not conflict, which is evidenced by the Court of Appeals' harmonization of the two decisions in *Wehner.* In fact, *Wehner's* holding explicitly relies on the *Wilder* Court's holding and is a well-founded decision that again provides the only workable approach that promotes ease of administration by allowing practitioners and trial courts to easily and accurately determine the MVRA's statute of limitations with information that is readily obtainable from the PIP payment ledger of a Plaintiff's insurance carrier.

Moreover, pursuant to CR 76.28(4)(c), "unpublished Kentucky appellate decisions rendered after January 1, 2003, may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court." *Wehner* is

the only Kentucky decision that appears to squarely address the effect of a replacement check on the MVRA's statute of limitations. Kentucky courts have confirmed that when an unpublished decision meets the criteria of CR 76.28(4), it is persuasive authority. *See Honeycutt v. Norfolk Southern Ry. Co.*, 336 S.W.3d 133, 135 (Ky. App. 2011). As noted above, *Wehner* is strikingly similar to the present action and addresses the very issue before this Court. Further, *Wehner's* holding is based on well-established Kentucky law. Therefore, *Wehner* can and should be considered and its logical underpinning adopted by this Court.

In *Wehner*, a panel of the Court of Appeals addressed the issue regarding reissuance of a PIP payment previously made to a medical provider. *Wehner*, 2006 WL 2033894. Wehner sustained personal injuries as a result of a motor vehicle accident and received medical treatment for her injuries. *Id.* at *1. Her PIP carrier, State Farm Insurance Company ("State Farm"), made its last PIP payment to a medical service provider on December 13, 2000. *Id.* However, the medical service provider either did not receive a check or lost it and requested that State Farm reissue the check. *Id.* A new check was reissued on August 13, 2001. *Id.*

Wehner filed her complaint on July 13, 2003. *Id.* The Defendants moved for summary judgment claiming the Complaint was filed after the two year statute of limitations had run. Wehner claimed that the reissuance of the payment constituted the last payment that started the running of the statute of limitations. *Id.* The trial court granted summary judgment in favor of the Defendants, holding that the reissuance of the PIP payment to the medical provider did not re-start the statute of limitations and that the last

PIP payment was made on December 13, 2000. *Id.* Therefore, Plaintiff's Complaint was barred by the statute of limitations. *Id.*

Wehner appealed and the issue before the Court of Appeals was whether the two year statute of limitations had run prior to Plaintiff filing her Complaint. If the date of the re-issued check was deemed to be the measuring date that commenced the running of the statute of limitations, then the Complaint was timely filed; however, if it was not, then her Complaint was time-barred. *Id.* In affirming the trial court's decision, the Court of Appeals relied on its decision in *Wilder* and held the "the date the PIP provider issued the check is the date the PIP provider 'made' the payment." *Id.* (citing *Wilder*, 113 S.W.3d 189 (Ky. App. 2003)). The Court further clarified that *Wilder* "makes it clear that the date a check is received or deposited has nothing to do with the date of final payment. Final payment is the date the last check is cut, dated, or made." *Id.* at *2. Because the August 13, 2001 check was a **replacement check** and **not** made for additional services, Wehner's Complaint was barred by the statute of limitations. *Id.*

Wehner is almost identical to the present matter, and is dispositive of the issue before the Court. Here, the last PIP payment was made on August 13, 2009, when Cincinnati Insurance made a partial payment to Jewish Hospital and advised the hospital that Appellant's PIP coverage was exhausted. Shortly thereafter, Cincinnati Insurance advised Liberty Mutual and three additional providers that Appellant's PIP benefits had been exhausted. (R. at 257; 260-264). On September 15, 2009, a request was made to stop payment on a check dated March 17, 2009 because the medical provider had lost the check. (R. at 259). On September 25, 2009, the March 17 payment was "reversed" and Cincinnati Insurance reissued a check to replace that payment. The subsequent check was not

payment for a new or different service, but rather a replacement for a lost check. In other words, it was a transaction solely between Cincinnati Insurance and a particular medical provider and did not involve Appellant in any way (other than the fact that the original payment was made at Appellant's direction to pay her medical bill). As the *Wehner* Court held, the re-issued check did nothing to re-start the statute of limitations clock that had already started running and did not change the fact that the last PIP payment had been made on August 13, 2009. Appellant's Complaint, filed on September 21, 2011, was filed outside the two year statute of limitations set forth in the MVRA and is therefore time-barred.

At one point Appellant argues that the date the replacement check was issued (September 25, 2009) is the date from which the limitations period should be measured. This argument is quite telling, perhaps more importantly for what it does not say than what it does. Specifically, the underlying premise itself – that the date of the replacement check is material in determining the proper measuring date for the statute of limitations – is not supported by Kentucky law. But more importantly, this argument completely undercuts Appellant's overall position that the proper measuring date is the date on which a check is received by the payee or paid by the bank. In other words, when she advocates for September 25, 2009 as the correct measuring date because it is the date that Cincinnati Insurance recorded the replacement check as having been issued, she admits the legal significance of the date on which a reparation obligor issues a payment in determining the measuring date for the limitations clock to commence. Yet, seeming oblivious to the contradiction inherent in her argument, Appellant urges this Court to disregard applicable

Kentucky law that expressly states that the issuance of a replacement check does not affect the running of the statute of limitations under KRS § 304.39-230(6). *Wehner, supra.*

Appellant contends that she consulted the PIP ledger and filed her Complaint within what she thought was the two-year statute of limitations. Therefore, she claims, she should not now be barred from proceeding with her Complaint against Appellee because she took reasonable steps to determine the date that the limitations statute would run. However, Appellant's argument lacks merit. Indeed, Appellant's review of the PIP ledger would have alerted her to the fact that the total of the entries contained thereon is $10,400.00. (R. at 265). That amount is clearly in excess of the $10,000.00 PIP limit. Further investigation would have revealed that the PIP ledger shows that the March 17, 2009 payment for $400.00 was "reversed," and a $400.00 payment was reissued on September 25, 2009. The Court of Appeals majority properly concluded that these inclusions on the PIP ledger should have at least prompted Appellant to conduct further inquiry in regard to the PIP payments. In any event, her alleged reliance on a document produced by Cincinnati Insurance cannot logically, legally or fairly inure to her benefit at the detriment of Appellee. He had nothing to do with the production of that document and it would be illogical to hold him accountable for its content by allowing it to re-start the statute of limitations clock that had already started when Appellant exhausted her PIP benefits.

KRS § 304.39-230(6) specifically provides that "an action for tort liability not abolished by KRS § 304.39-060 may be commenced no later than two (2) years after the injury, or the death, or the last basic or added reparations payment made by an reparations obligor, whichever later occurs." Pursuant to *Wilder*, "the date the PIP provider made the last payment to the medical service provider begins the running of the two-year statute of

limitations." *Wilder*, 113 S.W.3d at 190. Further, the Kentucky Court of Appeals in *Wehner* clarified that the reissuance of a check to replace a PIP payment previously made to a medical provider does not toll or re-start the statute of limitations. A re-issued check is not considered the last payment because it is a replacement check not made for additional services. *Wehner*, at *1-2. Once the two-year clock starts to run after an insured exhausts her PIP coverage, there is no basis (either factually or legally) to re-start it.

As such, the reissuance on September 25, 2009 of the March 17, 2009 payment did not extend the two year statute of limitations and, simply stated, was **not** the last PIP payment. The September 25, 2009 check was merely a replacement check for a payment Cincinnati Insurance had previously made, and was not a payment made for additional services. Thus, it is undisputable that the last PIP payment was made on **August 13, 2009**. Appellant commenced this action on September 21, 2011. Without question, her Complaint is time-barred. Therefore, the Order of the trial court dismissing all of Appellant's claims against Appellee was properly granted and the Court of Appeals' ruling affirming that holding should likewise be affirmed by this Court.

III. Appellee Is Not Estopped From Asserting a Valid Statute of Limitations Defense Based on Factually Incorrect Representations Made by Appellant's Reparations Obligor.

Appellant contends that she consulted the PIP payment ledger provided by her reparation obligor, Cincinnati Insurance, and relied on an incorrect representation made by **her insurer** in determining the deadline to file her Complaint. Understandably, in her Court of Appeals dissent, Judge Combs expressed her concern about the seeming unfairness of this unusual set of circumstances, and stated that Appellant should be allowed to move forward with her Complaint because "[s]ound and time-honored principles of

estoppel should apply to prevent Cincinnati Insurance from denying this critical representation." Court of Appeals Opinion, p. 7. However, although it may be unfortunate that Appellant relied on representations of her own insurer, Appellee cannot be made to suffer the consequences.

In considering the possible preclusive effect of the incorrect information, it is important to consider the source of the information upon which Appellant claims to have relied. First, as the Court of Appeals majority noted, a review of the PIP ledger would have shown that the total amount of payments was in excess of the PIP limit, which should have put Appellant on notice to look further. The PIP ledger showed that the March 17, 2009 payment for $400.00 was "reversed" and a $400.00 payment was reissued on September 25, 2009. These entries on the PIP ledger should have prompted Appellant to inquire further about the PIP payments. That is not an attack on Appellant's due diligence – it is simply a statement of who has an obligation, and is in the best position, to determine the deadline for bringing suit when the limitations period is based on something that is in Appellant's exclusive control: the timing of her medical treatment and payment of related expenses.

Here, Appellant was advised by her insurer that her bill from Jewish Hospital was only partially paid and bills from other providers were unpaid because her PIP benefits were exhausted. That was not something Appellee would have the ability to know (outside the context of discovery during litigation), and most assuredly is not something he would have represented to Appellant. Appellant's alleged reliance on a document **produced by Cincinnati Insurance – her own insurer** – cannot logically, legally or fairly inure to the detriment of Appellee. He had nothing to do with producing that document and it would

be illogical to hold him accountable for its content. Moreover, a Plaintiff is presumed to know that an action will be barred after the limitations period has run and has no right to rely on representations of an insurer. *See Gibson v. EPI Corp.*, 940 S.W.2d 912 (Ky.App. 1997).

Equitable estoppel is a defensive doctrine founded on principles of fraud, under which one party is prevented from taking advantage of another party that it has falsely induced to act in some injurious or detrimental way. The elements of equitable estoppel under Kentucky law are: (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. *Sebastian-Voor Properties, LLC v. Lexington-Fayette Urban County Government*, 265 S.W.3d 190, 194-95 (Ky. 2008), *quoting Weiand v. Bd. Of Trs. of Kentucky Ret. Sys.*, 25 S.W.3d 88, 91 (Ky. 2000), and *Electric and Water Plant Bd. of Frankfort v. Suburban Acres Dev., Inc.*, 513 S.W.2d 489, 491 (Ky. 1974).

Under Kentucky law, "equitable estoppel requires both a material misrepresentation by one party and reliance by the other party." *Fluke Corporation v. LeMaster*, 306 S.W.3d 55, 62 (Ky. 2010). Of course, none of these elements apply to Appellee because neither he nor his insurer had anything to do with making the incorrect representations to Appellant's counsel regarding the date of the last PIP payment. Appellant's own insurer, Cincinnati Insurance, is solely responsible for that

representation. Thus, there is no legal basis for estopping Appellee from asserting a legally proper and factually supported limitations defense to Appellant's lawsuit.

IV. Appellant's Approach Would Introduce Uncertainty and Possible Manipulation Into Determination of the Measuring Date for the MVRA Statute of Limitations.

Appellant proposes two other alternatives as the proper measuring date for the MVRA's statute of limitations: (1) the date the check is delivered to a payee; or (2) the date the check is ultimately presented to and paid by the reparations obligor's bank. Appellant observes that the approach taken by Kentucky courts in MVRA matters in utilizing the date the reparations obligor disburses the check is the only instance where Kentucky law utilizes such an approach in determining a statute of limitations.

The purpose for a statute of limitations is clear, as this Court recently reiterated:

> Generally, "[t]he Kentucky General Assembly and this Court have long recognized the value of statues which 'bar stale claims arising out of transactions or occurrences which took place in the distant past.' *Munday v. Mayfair Diagnostic Lab*, 831 S.W.2d 912, 914 (Ky. 1992) (*quoting Armstrong v. Logsdon*, 469 S.W.2d 342, 343 (Ky. 1971)). As such, "provisions of statutes of limitations should not be lightly evaded." *Id.* (*citing Fannin v. Lewis*, 254 S.W.2d 479, 481. (Ky. 1952).

Emberton v. GMRI, Inc., 299 S.W.3d 565, 573 (Ky. 2009). This Court has repeatedly demonstrated its firm commitment to enforcement of statutes of limitations. *Munday v. Mayfair Diagnostic Lab*, 831 S.W.2d 912, 914 (Ky. 1992). There are certain exceptions to the general rule; however, none of those apply in this matter. *Id.* For example, in general parties may by agreement or contract shorten or extend the limitations period. That is not an issue here. An estoppel may arise to prevent a party from relying on a limitations defense. That is not an issue here, as explained above, because Appellee has taken no

action to warrant such a sanction. The "Discovery Rule" may on occasion extend a limitations period. See *Emberton, supra.* However, this rule does not apply to tort actions under the MVRA.[8] Under certain circumstances, a legal disability may toll the commencement of a limitations period until the disability is removed. Interestingly, however, the MVRA does not allow a legal disability to toll the commencement of an action for PIP benefits and "the period of his disability is a part of the time limited for commencement of the action." KRS 304-39-230(5). In interpreting that statute in *Jackson v. State Auto Mut.Ins. Co.*, 837 S.W.2d 496 (Ky. 1992), this Court utilized general rules for interpreting statutes: statutes that are narrower in scope and that are implemented after a statute broad in scope are given effect over the broader statute. *Id.*, at 498. While that sub-section of the statute is not applicable here, it is certainly instructive in evaluating Appellant's position that Kentucky courts have a duty to liberally interpret the MVRA to broaden accident victims' ability to make claims. Appellant's Brief, p. 4. While that may be a general approach and a laudatory goal, it does not open the door to unbridled discretion or unfettered expansion of a clear, unambiguous measuring date for the MVRA's limitations period.

Appellant's argument at page 5 of her Brief that the approach espoused by the *Wilder* Court and followed below would result in a statute of limitations that "can change erratically" is unfounded. In fact, to the contrary, it is Appellant's approach that would introduce uncertainty into the determination of the MVRA's limitations measuring date.

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[8] *Frost v. Dickerson,* [2010-CA-000537-MR (February 24, 2012)] (copy attached as Exhibit 3), cited pursuant to CR 76.28(4). The Court of Appeals declined to extend the discovery rule to the MVRA, citing the Court of Appeals' guidance that "[t]he courts in this Commonwealth have been reluctant to extend the discovery rule and have applied it narrowly." *Roman Catholic Diocese of Covington v. Secter*, 966 S.W.2d 286, 289 (Ky.App. 1998).

Appellant's approach is unworkable for a number of reasons. It would have the perverse effect of making the statute of limitations a moving target, and as such would introduce uncertainty into the determination of the proper measuring date, where no such uncertainty currently exists. In the first instance, Appellant does not even pin down the approach she wants to advocate, whether it be the date the payee receives a check, the date the check is presented by a payee to be paid, or the date the insurance company's bank actually effects the transfer of funds out of the insurance company's bank account to some other entity. It is clear that Appellant simply wants to find a way to extend the limitations period by making the measuring date the latest date possible. There is no legal authority for such an approach.

Additionally, the information that would be required to use this approach is not readily attainable by the parties, but would require an intrusion into banking records that, in most if not all situations, would be difficult if not impossible to obtain. Appellant's approach would create endless confusion and undue burden resulting from providers' and insurers' banks arbitrarily being drawn into disputes of this nature to determine when a check was presented and paid. This presents an approach whose complexity only increases when considering the likelihood of out-of-state providers or banks, whose records would be available, it at all, only with great expense and effort. An additional pitfall exists every time there is a provider or bank that has gone out of business or otherwise vanished in the intervening two years. Appellant's approach would require that extensive information be obtained, if possible, on each and every PIP payment made in order to determine the date each check was received by the payee and ultimately presented to and paid by the insurance company's bank.

Recognizing this shortcoming with her suggested approach, Appellant acquiesces that in some instances the parties may have to settle for a "constructive" date for determination of the proper measuring date. That is not an acceptable outcome and would introduce great uncertainty into the administration of the MVRA's limitations period by practitioners and courts charged with implementing the rules with guidance from this Court. In short, contrary to her position as stated on page 5 of her Brief, it is Appellant's approach that would create a measuring date that "can change erratically depending on whether a medical provider lost a check, and on whether a reparation obligor chooses to disburse another one in its place." Appellee's approach – and the one administered consistently by trial courts in reliance on *Wilder* – is one that promotes ease of administration and is the only approach that promotes certainty in determining the proper measuring date for the MVRA's limitations period.

Another problem with Appellant's approach is that it would allow potential manipulation of the measuring date. For instance, if the measuring date is marked from the date a check is accepted and paid by the insurance company's bank a claimant could artificially extend the limitations period by holding onto a check for as long as possible before presenting it for payment. In *Graham v. Heine*[9] (copy attached as Exhibit 4), the Court was presented with a situation where the claimant, after exhausting her PIP coverage, reimbursed her PIP carrier for an alleged overpayment of her lost wage claim and then directed the carrier to make a payment of a particular medical bill. If the directed payment was the proper measuring date, then the claimant's suit was timely filed, otherwise it was not. The Court of Appeals affirmed the trial court's dismissal of the suit on limitations

[9] *Graham v. Heine*, 2009 WL 4722822 [2008-CA-001128-MR (December 11, 2009)] is an unpublished Opinion from the Court of Appeals cited pursuant to CR 76.28(4).

ground, finding that "[t]o hold otherwise would allow the statute of limitations in KRS 304.39-230(6) to be unfairly manipulated by a BRB payee." Id., p. 4. Additionally, appellate courts have rejected any action by an insurer that may create doubt or confusion as to the date of the last PIP payment. *See Stull v. Steffen*, 374 S.W.3d 355 (Ky.App. 2012) (payments that the insurer had designated as Med-Pay were deemed to be PIP benefits until PIP benefits were exhausted in order to promote uniformity in application of the MVRA's limitations period). *See also, Lawson, supra*, at 57 – 58 (condemning any alleged attempt by an insurer to manipulate the statute of limitations by its characterization of PIP payments).

Appellant urges the Court to consider the approach taken in cases involving the calculation of statute of limitations in Worker's Compensation cases as well as the approach taken in stating the deadline for those entering the Kentucky Retirement System to declare the manner in which they want to be paid. In both of those instances Appellant urges this Court to adopt the rule that payment is based on the date a check is received by the claimant. Thus argument must be rejected for a couple of reasons. First, this method of determining the measuring date as the date of delivery of the check to a payee was not presented to the trial court nor the Court of Appeals below. Matters not raised or adjudicated before the trial court cannot be considered when raised for the first time on appeal. *Fischer v. Fischer*, 197 S.W.3d 98, 102 (Ky. 2006). "[A]ppellants will not be permitted to feed one can of worms to the trial court judge and another to the appellate court." *Elery v. Commonwealth*, 368 S.W.3d 78, 97 (Ky. 2012).

Moreover, both of those situations easily can be distinguished from the current issue and do not provide helpful guidance that would be workable in the MVRA context. In fact,

this Court has previously rejected an attempt to introduce MVRA principles into the analysis of the workers' compensation statutory scheme. *See Holbrook v. Lexmark Int'l Group, Inc.*, 65 S.W.3d 908, 912 (Ky. 2002).

Appellant directs the Court's attention to *Lawson v. Kentucky Retirement Systems*, 291 S.W.3d 679 (Ky. 2009) in support of her argument that the delivery of the PIP payment check should mark the measuring date for limitations purposes. However, even if the argument had been properly presented and preserved below, the circumstances of that case are far different and can easily be distinguished from this case. In *Lawson*, a recent retiree from the State was denied the right to change his retirement benefits payment option. While he had made the request before the time deadline he had been given, the State denied the request because the State Treasury had already issued the first payment check. This Court ruled that his request was indeed timely, and crucial to that holding interpreted the phrase "payment has been issued" within the statutory framework to require delivery of the check.

> Here, Appellant not only correctly understood the meaning of "payment is issued," but also had the right to rely on the date KERS told him he would be paid: "on or around 09/27/2004." He notified KERS of his desire to change his payment option 11 days prior to that date, on September 16, 2004. No reasonable person would have believed he would be paid that many days earlier than the date he had been given, especially since he had no notice of such and was not able to access the money.

Id., at 682. This holding can be distinguished in two ways. First, the action at issue in *Lawson* was allowed or prohibited based on the date on which the claimant was told he would receive a payment. He made his request before that date, and equity dictated that he be allowed to do so. Moreover, in *Lawson* the crucial issue was when it would be clear

that payment had been issued, and the most apparent answer to that inquiry was when the claimant received physical possession of the check. If he had not yet notified KERS of his change of mind by that time, he would clearly have been on notice that it was too late to do so. The problem in *Lawson* was compounded when the check was issued much earlier than the date on which the claimant was expecting it, and that action – which was totally out of the control of the claimant – worked to his detriment until this Court remedied the situation by reversing the Court of Appeals.

Another basis to distinguish is the fact that the payment at issue in *Lawson* was by definition a payment that would be made to the claimant/insured himself. In other words, the payee of the benefits check would always be the same person as the intended beneficiary. Obviously, that fact was important in the Court's analysis insofar as it held that the check "must be delivered to the beneficiary to be a 'payment.'" *Id.* at 681. A beneficiary in that sense (i.e., the payee/insured) would always have access to the information necessary for this analysis. On the other hand, payments by PIP insurers are far different in that the list of potential payees is limitless and includes numerous possibilities in addition to the claimant/insured (i.e., the "beneficiary"). It defies logic and common sense to imagine that an insured in Appellant's position would have any idea of when checks were sent by the PIP insurer to specific payees or what those payees did with the checks once they received them.

Appellant's reliance on workers' compensation cases is equally inapplicable. In *Sturgill Lumber Co. v. Maynard*, 447 S.W.2d 628 (Ky. 1969), this Court's predecessor examined the issue of what the phrase "cessation of voluntary payments" means in the workers' compensation limitations provision. Important to analyzing when payments

ceased was determining when the claimant received the last payment. In finding the date of receipt to be the pertinent measuring date, the Court rejected the argument that the statute of limitations should be determined by looking to the last day of the period for which the payment was made. There, the only type of payments involved were payments made directly to the claimant, and the limitations period was tied to that payment. So it made sense to use that date the claimant received the check as the date to start the limitations clock running because that would always be a date within the claimant's personal knowledge. Additionally, although the Court ultimately held that the date of receipt would start the clock, it had no occasion to examine the potential difference between the date the insurer sent the check and the date it was received because that precise question was not presented or analyzed as the claim was timely filed based on the earlier date.

Appellant's reliance on an unpublished workers' compensation opinion analyzing the phrase "suspension of income benefits" is likewise misplaced. There, the Court examined whether the tolling provisions of the workers' compensation statute of limitations expired at the end of a time period for which Temporary Total Disability (TTD) benefits were due (but not paid) or the date on which a check was sent that represented an actual payment for benefits that became due and payable during that time period. The confounding issue was that the payment at issue was made about seven months late, after the employer's carrier discovered that it had underpaid the amount actually due. This Court sided with the employee/claimant that the statute of limitations was extended by the late payment. Again, this case is factually distinguishable for a couple of reasons. First, unlike the present matter, there was no upper limit set by statute on the potential amount

of workers' compensation benefits for which the carrier could ultimately become responsible. Thus, when the carrier discovered after the fact that it had underpaid a portion of the claim, it was obligated to go back and make that additional payment. Here, the total amount of PIP benefits for which Cincinnati Insurance could ever be held responsible was $10,000.00 – the amount required by law. Once Cincinnati Insurance paid that amount, Appellant's benefits were exhausted and Cincinnati Insurance had no further obligation to Appellant or her medical providers. Second, the subsequent payment to Lovely in the workers' compensation case represented a net new payment of cash. Here, Appellant exhausted her PIP coverage, as Cincinnati Insurance indicated in correspondence to Appellee's insurer and four of Appellant's medical providers. After it had exhausted the coverage, however, Cincinnati Insurance was informed that one of the previous checks had been lost by a provider. Solely as an accommodation to that provider, Cincinnati Insurance agreed to send a different check to take the place of, or in substitution for, its prior payment. That was a transaction that did not involve Appellant and did not involve any net new benefit payment. It was simply a transaction between the PIP obligor and one of Appellant's providers. That accommodation by Cincinnati Insurance did not act to re-open the PIP claim. No funds came back into the available PIP coverage – a finite obligation that Cincinnati Insurance had to Appellant and any other party to which she directed payment – which had already been exhausted (i.e., completed used, entirely consumed). Appellant's PIP coverage had been exhausted, which by its very nature started the two-year limitations clock running.

The situation here is far different. What is at issue here is a stream of payments made by the PIP carrier to a number of different medical providers over an extended

period of time, the latest of which was more than two years before the lawsuit was filed and none of which involved payments directly to Appellant (although the payments were made at her direction for treatment she received). The stream of checks did not come into Appellant's hands, so her involvement in receiving the checks or ultimately presenting the checks to the PIP carrier's bank is not a salient factor in assessing the legislative intent or even the plain meaning of the term "payment" in the MVRA's limitations section. What ultimately happened to each check involved a transaction between Cincinnati Insurance Company's bank and the payee of the individual check. The important part of each individual transaction for purposes of the MVRA is the date on which the insurance company sent it to the payee – a date certain that can be easily ascertained in all instances from the PIP payment log. That is the approach set forth in *Wilder* and its progeny and it provides the only workable approach for determining the proper measuring date for MVRA actions.

V. Existing Authority Provides the Only Workable Approach as it Establishes a Clear, Unambiguous, and Easy to Determine Measuring Date.

As a practical matter, Appellant's position would make it exceedingly difficult for an individual to ascertain information about the date of a PIP payment. Under Appellant's approach, in order to confirm the date of a PIP payment, one would have to first identify the medical service provider's bank and then request information from the bank regarding the provider's bank transactions. Such transactions are generally always confidential and certainly could not be readily provided by the bank. Appellant's approach would also require trial courts to dig into the date a check is ultimately funded to the payee in order to define the MVRA's limitations measuring date. Obviously, that information is usually not included in the Record and frequently may not be available at all. Moreover, such an

approach would require the introduction of much irrelevant, and likely confusing, information into the court's file. And for no sound reason.

It takes no keen analysis to see that such an approach is patently absurd and cannot possibly be what the Legislature intended in setting a special statute of limitations for the MVRA. As pointed out by a panel of the Court of Appeals in *Aleshire,* an "easily documented final date is appropriate." *Aleshire,* at *1. Appellant's approach would create endless confusion and undue burden resulting from providers' banks arbitrarily being drawn into PIP disputes to determine when a check was presented and paid. That cannot and should not be Kentucky law.

On the other hand, the rule set forth in *Wilder*, which consistently has been followed by all other Court of Appeals panels (including the panel below) for the past decade, provides the only workable approach. The date of the last PIP payment is easily determined, if necessary, from the PIP payment ledger that is available to a potential litigant in Appellant's position, and can be obtained by an alleged tortfeasor in Appellee's position through discovery at the outset of litigation in which there may be a potential statute of limitations defense. The date listed on the PIP payment ledger provides a clear and unambiguous measuring date that ends the tolling of the limitations period under the MVRA and commences the two-year clock running for filing a lawsuit. That is the only date that is readily available to all parties in all circumstances and is a reliable source from which to determine the date of "the last basic or added reparation payment made by any reparation obligor." KRS 304.39-230(6). This approach promotes ease of administration in determining the proper measuring date for commencement of MVRA actions because it provides a bright-line rule that is not subject to manipulation.

CONCLUSION

KRS 304.39-230(6) requires that Appellant's suit be brought no later than two years after the last payment of PIP benefits. The last PIP payment was made on August 13, 2009, when her PIP benefits were exhausted by a partial payment of one of her medical bills and her two-year limitations clock started running. The September 25, 2009 check made payable to Kentucky Orthopedic was simply a re-issuance of payment that had already been made to that provider and did not re-start the limitations clock. As such, the replacement check did not extend the two year statute of limitations and did not change the fact that the last PIP payment was made on August 13, 2009, when Appellant exhausted her PIP benefits. When Appellant filed her Complaint on September 21, 2011, it was time-barred and Appellee properly asserted a valid limitations defense.

Therefore, Muluken Zeru respectfully requests that the Court of Appeals ruling affirming the Circuit Court's Order be affirmed in all respects.

Respectfully submitted,

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